

Upper Clark Fork River Basin Steering Committee
Meeting Summary
September 19, 2007

Introductions

Gerald Mueller and members of the Upper Clark Fork River Basin Steering Committee (Steering Committee) introduced themselves. Those in attendance included:

Members

Senator Dave Lewis
Mike McLane
Jim Dinsmore
Jim Quigley
Dan Ueland
Marci Sheehan
Bob Benson
Carol Fox
Holly Franz
Jules Waber

Group/Organization Represented

Lewis and Clark County and Senate District 42
Montana Department of Fish, Wildlife and Parks (DFWP)
Granite Conservation District
Little Blackfoot River
Mile High Conservation District
Atlantic Richfield (ARCO)
Clark Fork Coalition
Natural Resource Damage Program (NRDP)
PPL Montana
Powell County

Public

Maureen Conner	Granite County Commissioner
Randy Hawkins	Nevada Creek

Staff

Curt Martin	Montana Department of Natural Resources and Conservation (DNRC) Water Resources Division
Bill Schultz	DNRC Missoula Regional Water Resources Office
Gerald Mueller	Facilitator

Agenda

- Review summary of the May 2, 2007 Meeting
- Updates
 - Steering Committee budget
 - Water Policy Interim Committee meeting
 - Clark Fork River consent decree
- Basin Water Right Change Applications
 - Georgetown Lake water right
 - Clark Fork River water rights
- Summer Basin Water Management Activities
 - Warm Springs Creek
 - Blackfoot River
 - Flint Creek
 - Nevada Creek
- Water Milltown Dam water right paper
- Steering Committee Work Plan
- Public Comment
- Next Meeting

May 2, 2007, 2007 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Updates

Steering Committee Budget - Gerald Mueller reported that thanks to the work of Senator Lewis, the 2007 legislature included \$20,000 in DNRC's 2008-2009 budget to support the Steering Committee. Mr. Mueller and Curt Martin are working on the details of a contract for facilitation services. The budget originally proposed to the legislature included \$15,000 for facilitation and administration expenses, \$3,000 for meeting expenses including mileage and lunches for Steering Committee members, and \$2,000 for publications.

Water Policy Interim Committee Meeting - Gerald Mueller reported on the activities of the legislative Water Policy Interim Committee (WPIC). The committee devoted its first three meetings to understanding water law and current water issues. At its most recent meeting on September 12 in Thompson Falls, Mr. Mueller made a presentation on the Milltown Dam water rights. See Appendix 1 for the presentation content. Appendix 2 is a list of issues prepared by Representative Cohenour to aid WPIC designation of priorities for its future work. WPIC requested advice from the public about its priorities.

Steering Committee Action - After a discussion, the Steering Committee agreed to send a letter to WPIC recommending three priority topics: exempt wells, water right enforcement, and Subdivision permitting, including DNRC's role in it and coordination of the Montana Department of Environmental Quality with county subdivision reviews. Mr. Mueller was directed to draft the letter and circulate it to the Steering Committee for comment prior to mailing it to WPIC.

Clark Fork River Consent Decree - Carol Fox reported that progress is being made by the State and ARCO toward a consent decree for the Clark Fork River Superfund site. The consent decree may be completed by the end of the year, after which would follow a 30-day comment period.

Basin Water Right Change Applications

Georgetown Lake Water Right - Bill Schultz summarized the status of the change filing involving Georgetown Lake water rights. Presently, Granite County, the owner of Flint Creek Dam, has three rights for producing hydropower at the dam, a 30 cfs flow right and two storage rights. Granite County filed for a change in the purpose and place of use of the rights in November 2004. DNRC asked for changes to the application. The County made changes, and DNRC deemed the application correct and complete in January 2006. The application was then noticed for public comment. Granite County's change application specifies two new beneficial uses, recreation and fish and wildlife, and a change in place of use from the dam to the surface of the lake. A hearing on the application was held in July of this year. According to the hearing examiner in this case, a decision is likely in about 60 days. The hearing examiner's decision can then be appealed to DNRC. After DNRC makes a final decision, it would then be subject to appeal to district court.

Comment by Maureen Conner - In filing its change application, the county was acting on advice from Eugene Manley that every effort should be made to preserve the water right. While Montana Power Company's hydropower generators and associated equipment has been

removed, the County is seeking the installation of new generation equipment. It is not the County's intent to abandon the water rights.

Comment by Jim Dinsmore - I and other lower basin irrigators potentially affected by the Georgetown change did not participate in the hearing for two reasons. First, the hearing was held during the peak of the irrigation season, when irrigators are working. Second, to be effective, participation in the hearing requires objectors to hire lawyers and technicians, which is too expensive for many. Far too much water right enforcement burden falls on individual water right holders.

Clark Fork River Water Rights

Butte-Silver Bow Rights - Holly Franz discussed these rights. In August 2006, Butte-Silver Bow was granted two changes to its existing water rights. Both change applications dealt with stored water from Silver Lake and Storm Lake and direct flow water from Warm Springs Creek. One, application 30013720, changed the use of some of the water diverted at Meyer's Dam from industrial to instream flow to benefit the fishery in Silver Bow Creek from its confluence with Blacktail Creek to the Warm Springs Pond. The amount of water in the change is 2,083 gallons per minute (gpm) up to 3,360 acre-feet per year (acf/yr) or 4.6 cfs. The second, application 30013721, also changed an industrial use to instream flow, this time to benefit the fishery in Warm Springs Creek and the mainstem of the Clark Fork River from its confluence with Warm Springs Creek to Gold Creek. This change converted 15,580 acf/yr of water primarily stored in Silver Lake. Under an agreement between Butte-Silver Bow and ARCO, ARCO can call for the releases from Silver Lake. Since 2002, ARCO and Montana Trout Unlimited (TU) have had an agreement authorizing TU to monitor flows and call for release of water from Silver Lake to maintain a target flow of 40 cfs in Warm Springs Creek.

ARCO Water Rights - Mike McLane reported on changes sought by ARCO. ARCO filed two water rights change applications, 30013722 and 30012723, to convert water used for irrigation to maintain and enhance instream flows in Willow Creek to a level of 22 cfs and in Mill Creek to a level of 25 cfs to benefit their respective fisheries. Mill, Willow, and Silver Bow creeks combine in the vicinity of the Warm Springs Ponds to form the Clark Fork River. According to the applications, ARCO also intends the instream flows in these applications to continue into the Clark Fork River as far as Gold Creek. In January 2006, DNRC terminated these applications because they were not correct and complete but apparently did not so notify the applicant. Because of lack of notification, these applications were reinstated. DFWP, and specifically Mr. McLane, have assumed responsibility for pursuing the change applications because these changed rights will be transferred to by ARCO to it as a part of the Clark Fork River Superfund settlement agreement.

Summer Basin Water Management Activities

Gerald Mueller stated that it has been the Steering Committee's past practice to have status reports on the basin's water supply throughout the winter and spring. In recent years, including 2007, the water supply forecast was for shortages for the irrigation season. The Steering Committee has not followed up by discussing what happened during the subsequent irrigation season. He therefore asked members from several watersheds to report on their experience this past summer.

Warm Springs Creek - Dan Ueland reported that during this past season the supply of water from Warm Springs Creek was ample. Through August 18, TU did not need to call for ARCO's

stored water from Silver Lake to keep creek flows at the target flow of 40 cfs. On August 18, TU called for 5 cfs. The significant late spring snowfall in the upper Georgetown basin plus timely rainfall were enough to keep flows up in Warm Springs Creek.

Blackfoot - Mike McLane reported that the Blackfoot Drought Committee will not assess the season officially until October. However, this past summer was like 2003. Flows were well below normal. This year, the drought plan triggered two weeks earlier than ever before. Yesterday, Blackfoot flows at Bonner were 414 cfs, compared to normal flows of 740 cfs. DFWP has Murphy instream rights in the Blackfoot River. Historically, DFWP made calls on two large users on the Blackfoot mainstem when flows dropped below the Murphy water rights. The Blackfoot Challenge created the drought plan to involve all Blackfoot water users and to provide them more flexibility to meet target flows than would DFWP water right calls. Last week, DFWP mailed water right calls to those users not cooperating in the drought plan, which in this case are mainly small users such as cabins. Since issuing the call, DFWP has not seen an improvement in river flow, probably because the uses called were too small to have an effect. As of yet, DFWP has not acted to enforce its calls, primarily because of staffing limitations. DFWP expects criticisms that it has not been assertive enough with small users.

Flint Creek - Jim Dinsmore summarized the experience this summer in Flint Creek. The water supply was good, and most irrigators had the water they needed. A water commissioner was not used to allocate Flint Creek flows, although this was at least part because no one someone was willing to be the commissioner. Late May and early June precipitation both allowed the watershed reservoirs, the East Fork and Lower Willow Creek, to fill and maintained stream flows. Lower Flint Creek experienced some low flows, but the situation was better than past years. Mr. Dinsmore made two other observations. First, funding has been approved to repair the siphon that moves water from the Rock Creek to the Flint Creek drainage. Second, people have been concerned that the switch from flood to sprinkler irrigation may adversely affect return flows to the streams later in the season. For more than one year, stream flows have appeared to increase in spite of the increase in sprinkler irrigation.

Nevada Creek - Randy Hawkins, the manager of Nevada Creek Dam, reported on water activities in the Nevada Creek watershed. This year had the 19th lowest dam inflow on record. The supply was 4,000 acre-ft less than last year. The runoff was also earlier than normal. On March 12, 2007, 6,000 acre-feet flowed into storage. Beginning in April, more water was released from the dam than flowed into it. The reservoir did have 300 acre-ft of carry over from last year. In spite of lower inflows, all contracts for stored water were honored. Some people were short, but a water commissioner was not used.

Milltown Dam Water Right Paper

Gerald Mueller led a discussion of the September 16, 2007 draft of the paper that had been circulated to the Steering Committee prior to this meeting. He noted that the draft is not yet complete. The sections on junior water rights above Milltown Dam will be augmented with a listing of the number of junior water rights by type of use and the section on enforcement and management alternatives remains to be written. Mr. Mueller also discussed his file memo dated August 31, 2007 which described an alternative for managing flows above the dam based on average daily hydrographs and sub-basin water production targets. This memo had also been circulated to the Steering Committee

prior to this meeting. See Appendix 3. Highlights of Steering Committee comments and questions on the draft paper follow.

- There is an alternative for transferring the Milltown Dam water rights to the State prior to NorthWestern attempting to sell them. After the dam is removed and the State receives the insurance refund, the State may exercise an option to acquire those land and water rights prior to any sales. In this event, NorthWestern shall receive full credit in the amount of the remaining balance of the \$1.4 million obligation and this obligation shall be considered to be fully satisfied.
- The management alternative discussed in the August 31, 2007 file memo would not be consistent with prior appropriation because the sub-basin target flows would not take priority date into account.
- Rather than basing them on average daily flows, the management alternative might use monthly or weekly flows to establish the target flows.
- Wouldn't the fact that the hydropower utilities have never made a call mean that they have forfeited the right to do so? Has case law addressed this?
Answer by Holly Franz - The utilities do not agree that this is the case. I am not aware of any case law on this point.
- In the Swan Falls case in Idaho, Idaho Power agreed not to make call in return for a minimum instream flow. This might be an approach we could follow at Milltown.

Mr. Mueller stated that he will revise the paper based on comments and draft its final section for consideration at the next Steering Committee meeting.

Steering Committee Work Plan

The Steering Committee agree to add to the list of work plan topics, consideration of DNRC's pending rules regarding objections to new permits and changes.

Public Comment

There was no additional public comment.

Next Meeting

The next meeting is scheduled for Wednesday, October 31, 2007 in Deer Lodge. The agenda will include the revised Milltown Dam water rights paper and the pending DNRC objection rules.

Appendix 1
MILLTOWN DAM WATER RIGHTS
REPORT TO INTERIM WATER POLICY COMMITTEE

By Gerald Mueller
Facilitator, Upper Clark Fork River Basin Steering Committee
September 13, 2007

MILLTOWN DAM

- Power house and spillway are scheduled to be removed in 2007 and 2008 as a part of the Clark Fork River Superfund remediation.

MILLTOWN DAM WATER RIGHTS

- When Montana Power Company (MPC) owned Milltown Dam, it filed two water right claims associated with the dam, one for power generation and one for storage.

POWER GENERATION CLAIM

- DNRC Claim No. 76M 94404-00
- Purpose of the water right - power generation
- Maximum flow rate - 2,000 cfs
- Maximum volume - 1,451,556.00 acre-feet
- Period of use - January 1 through December 31
- Priority date - December 11, 1904.

STATUS OF THE POWER GENERATION RIGHT

- Included in a temporary preliminary decree issued for the Middle Clark Fork Basin (76M) in 1984.
- Montana Water Court will not take final action on this water right claim until final decrees are issued in all three basins above the dam, the upper and middle Clark Fork River basins (76M and 76G) and the Blackfoot River basin (76F).
- The Milltown hydro power claim continues to be subject to objection in each basin.
- DNRC received a notice of change in the claim's ownership on June 2, 2005 after NWC acquired the dam.

STORAGE RIGHT

- MPC also filed a claim for storage at Milltown (Claim No. 76M 94405-00)
- The priority date, period of use and the point of diversion and its location are the same as for the power generation claim.
- MPC claimed a flow rate of 940 cfs up to the amount necessary to fill the storage reservoir at any time.

STATUS OF THE STORAGE RIGHT

- The 1984 temporary preliminary decree for 76M, did not recognize the storage claim, and MPC objected to it.
- The DNRC abstract for the Milltown storage right claim includes two remarks:
 - The water court finds no legal basis for this purpose to be considered a beneficial use or an appropriation of water.

- On June 7, 1985 the Montana Power Company (MPC) filed late objections to the purpose of right and "other". These will be heard after proper notice on the next objection list.
- DNRC received a notice of change in the claim's ownership on June 2, 2005 after NWC acquired the dam.

CONSENT DECREE

- On February 8, 2006, United States, Atlantic Richfield Company, NWC, State of Montana, and Confederated Salish and Kootenai Tribes entered into a consent decree for the Milltown Site.
- Consent decree addresses the Milltown water rights.

CONSENT DECREE WATER RIGHT PROVISIONS

- The Consent Decree provides that NWC must appraise and attempt to sell the Milltown water rights to meet a portion of a \$1.4 million obligation owed to the State.
- The State has the right to approve a sale of the rights.
- NWC must offer any unsold portion of the water rights to the State no later than 925 days following February 8, 2006, the effective date of the Consent Decree.
- The State then has 365 days following the completion of the remedial action or 1290 days after the effective date of the Consent Decree, whichever is later, to accept the water rights in whole or in part.
- If the State does not accept the water rights, then NWC must offer them to the United States and the Confederated Salish and Kootenai Tribes.
- These other parties would then have one year from the date of the offer to accept it in whole or part.
- Which ever governmental entity accepts the water rights must guarantee that they will not be changed to a consumptive use.
- As of August 2007, NWC had completed but not made public an appraisal of the Milltown Dam water rights

WATER RIGHT CHANGE AUTHORIZATION

- The removal of the dam will mean that the purpose of the existing rights will no longer be valid cease to exist.
- If the Milltown Dam rights are not to be lost kept alive, they must go through the change process.

Appendix 2

Water Policy Committee – Recommendations for prioritization – Rep. Cohenour

1. Water Quality Act Changes or Issues
 - a. Discharge
 - i. Surface water additions to ground water and public water supply issues
 - ii. Mixing zones versus nondegradation
 - iii. Size of mixing zone
 - iv. Mixing zones and well 100' radius cannot expand past property boundaries
 - v. Preconstruction inspection for septic location (stakes)
 - b. Community systems
 - i. Opportunities for cost sharing
 - c. Introduction of surface water to ground water
 - i. Treatment requirements
 - ii. Disinfectant byproducts
 - iii. Need for overlap between DNRC and DEQ
2. Definitions
 - a. Community well -- compare DNRC definition to DEQ definition. Do they need to be the same?
 - b. Public water supply definition
 - c. Municipal use
 - d. Combined appropriation
3. Enforcement/Monitoring
 - a. Water rights
 - b. Mitigation/aquifer recharge
 - c. Water quality
4. County Authority
 - a. Water quality
 - b. Legal availability – water rights before final plat
5. Exempt Wells
 - a. Subdivision regulations
 - b. Legal availability – agencies work together
 - c. Water marketing options
6. Incentives
 - a. Promote community water and sewer
 - b. Cost sharing state/county/industry
7. Water and sewer districts
 - a. Private vs. public
 - b. Oversight
8. Prioritize or provide new money for grant and loan programs for community water and sewer projects.
9. Subdivision size and type rather than just size to try to address applications submitted right under the cutoff.
10. Well Locations
 - a. Well Drillers Rules
 - b. Well Permitting through counties
 - c. Preconstruction inspection (pin location for well)
11. Subdivision applications

- a. Regardless of water source (exempt wells, community well, etc) require a hydrogeologic assessment of aquifer
 - b. Require monitoring wells and instrumentation of wells
 - c. Require pump testing to design capacity (for example if developer needs 100 gpm the developer must conduct pump tests showing that the well(s) is capable of meeting that need – either 1 well pumping 100 gpm or 20 wells pumping 5 gpm, etc.)
12. Aquifer Storage and Recover
- a. Impact on Public water supplies

Appendix 3

Memorandum

Date: August 31, 2007
To: Files
From: Gerald Mueller
RE: Hydropower Water Rights

Hydro rights and irrigation rights seemed to be different because the different nature of their respective beneficial uses. Irrigators can divert only the amount of water (plus carriage) necessary to water their crop. Thus the burden imposed on the stream is limited in both time and amount. Hydro power rights, on the other hand, especially when the turbines are sized to take peak flows, use almost all of the water all of the time. The seasonal nature of Montana's river flows means that peak flows generally occur over a limited time period and the flows outside this period are often much less than the peak. In turn, this means that hydropower utilities could make a call on most, if not all, juniors above them much of the year. Of course utilities have not made calls on any or all juniors, and maybe they never will.

Regardless of the legalities involved, I'm wondering if utilities might agree to management plans based on average daily hydrographs and sub-basin production targets. On a given day when hydropower rights are not filled, each sub-basin would be assigned to produce its percentage share of annual runoff in acre feet of the average daily flow at the dam. For example, assume the Blackfoot produces 52% of the annual volume of flow at Milltown. Assume also that the average daily flow on August 31 at Milltown is 1,130 cfs, less than the 2,000 cfs right. The the Blackfoot would have a responsibility to produce 52% of 1,130 cfs at its mouth or 760 cfs. If the actual flow of the Blackfoot was less than this amount, the basin would have to do something to increase flows to this level. In this way, hydro power production might be maintained at least to the level of the amount of water normally in the river rather than to the river's peak flow. The burden of providing this flow would be distributed to the sub-basins on an equitable basis. This might produce more hydropower than making calls based on a strict interpretation of hydropower water rights, which I think will become more and more unpopular.